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No. 739

In the Supreme Court of the United States

OCTOBER TERM, 1940

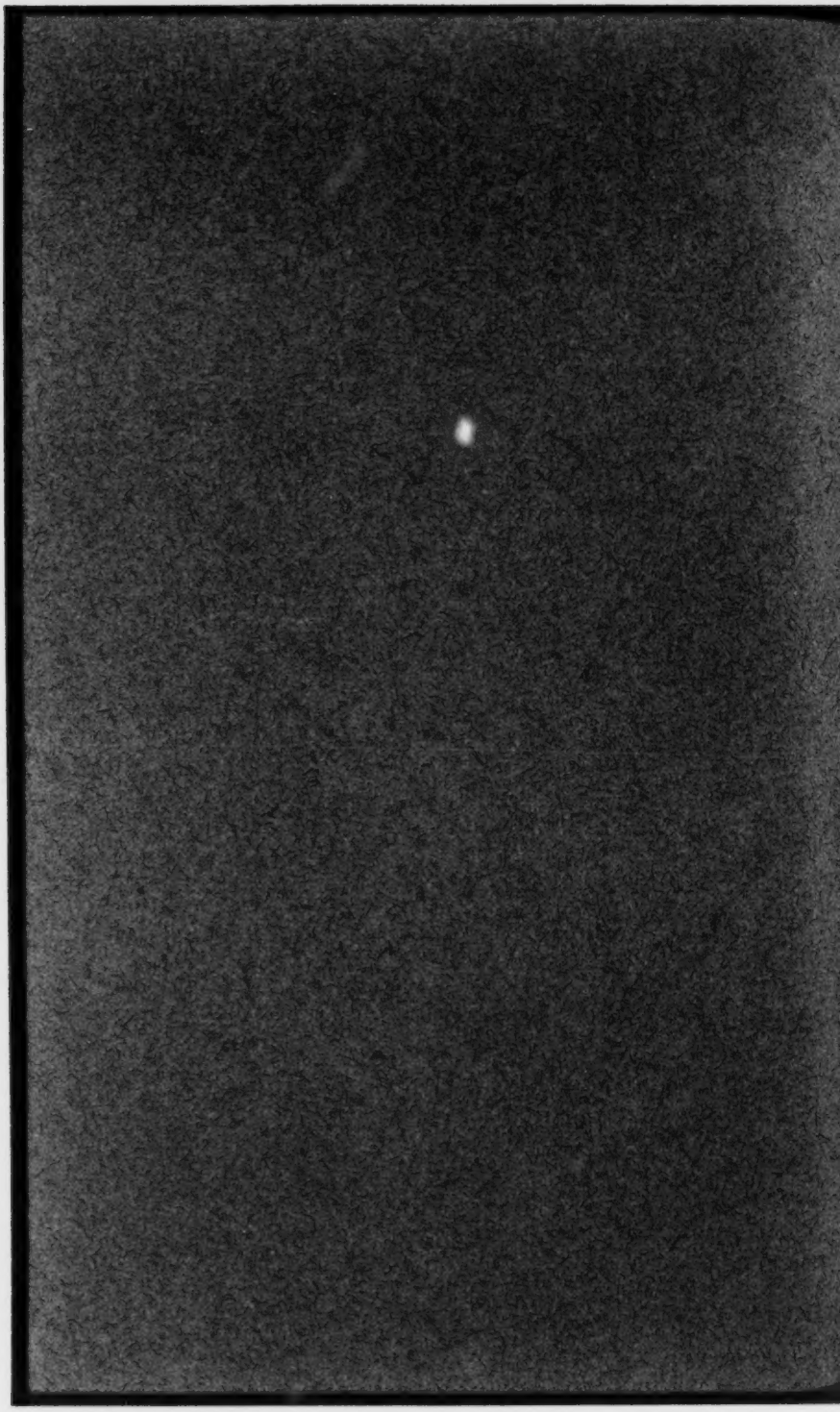
UNITED MOTOR SERVICE, INCORPORATED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION



INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	5
Appendix	6

CITATIONS

Cases:	
Allied Agents v. *United States*, 26 F. Supp. 98, certiorari denied, 308 U. S. 561	4
Billings v. *United States*, 232 U. S. 261	5
Chicago Telephone Supply Co. v. *United States*, 23 F. Supp. 471, certiorari denied, 305 U. S. 628	4
Flint v. *Stone Tracy Co.*, 220 U. S. 107	5
Rochester Gas & Electric Corp. v. *McGowan*, 115 F. (2d) 953	4
Tennessee Consolidated Coal Co. v. *United States*, 89 C. Cls. 542, certiorari denied, 310 U. S. 649	4
United States v. *Bennett*, 232 U. S. 299	5
Statutes:	
National Industrial Recovery Act, c. 90, 48 Stat. 195:	
Sec. 215	6
Sec. 216	8
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 701 (U. S. C., Title 26, Sec. 1358)	8

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OPINION BELOW

The opinion of the court below (R. 29–35) is reported in 35 F. Supp. 466.

JURISDICTION

The judgment of the Court of Claims was entered November 12, 1940 (R. 35). The petition for a writ of certiorari was filed February 1, 1941 (R. 35). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether the capital stock tax provisions of the National Industrial Recovery Act and of the Revenue Act of 1934 are unconstitutional.

STATUTES INVOLVED

The applicable statutory provisions are set forth in the Appendix (*infra*, pp. 6–10).

STATEMENT

The court below decided this case upon the petition and demurrer thereto (R. 29). From the petition the following facts appear:

Petitioner is a corporation engaged in the sale of automotive parts and accessories, and in the servicing of automotive vehicles (R. 1). Since the year 1918, General Motors Corporation has at all times owned all of the issued and outstanding capital stock of the petitioner (R. 2–3). For the years in which the filing of consolidated income tax returns for affiliated corporations was permitted, including the year 1933, General Motors Corporation filed consolidated income tax returns for itself and its subsidiaries, including petitioner (R. 6).

Prior to the time of the filing of the capital stock tax return for the year ended June 30, 1933, the persons charged with the responsibility of determining the values to be declared for capital stock tax purposes for General Motors Corporation and its various subsidiaries gave consideration to this question. It was finally decided that

the total of the values declared for General Motors Corporation and its subsidiaries should be substantially equal to such an amount as on a consolidated income and excess profits tax return for the year 1933 would not subject General Motors Corporation to any excess profits tax on net earnings up to 12½% on the capital and surplus as of December 31, 1932. The amount so determined was then allocated to the various subsidiaries on the basis of their relative estimated earnings for the year 1933. A similar method was adopted for the year ended June 30, 1934. The amount allocated to petitioner was $3,120,000 for the year ended June 30, 1933, and $6,000,000 for the year ended June 30, 1934 (R. 6–7).

For the year ended June 30, 1933, General Motors Corporation did not incur any excess profits tax liability on its consolidated income and excess profits tax return. For the year 1934, some of the subsidiary corporations paid excess profits taxes but the petitioner did not incur any excess profits tax liability (R. 9–11).

Petitioner filed capital stock tax returns for the years ended June 30, 1933 and 1934, showing the values above set forth, and paid the taxes assessed thereon (R. 5). Petitioner filed timely claims for refund of the taxes so paid, asserting that the statutory provisions imposing the capital stock tax were unconstitutional because, among other reasons, the tax was retrospective and the declaration of value for one year was binding for

other years (R. 16, 17–21). These refund claims were rejected by the Commissioner (R. 16) and the present action was thereupon begun. The Government's demurrer to the petition was sustained by the Court of Claims (R. 35).

ARGUMENT

This Court has denied three similar petitions for writs of certiorari. *Allied Agents* v. *United States,* 26 F. Supp. 98 (C. Cls.), certiorari denied, 308 U. S. 561; *Tennessee Consolidated Coal Co.* v. *United States,* 89 C. Cls. 542, certiorari denied, 310 U. S. 649; *cf. Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471 (C. Cls.), certiorari denied, 305 U. S. 628. The Government's brief opposing the petition for a writ of certiorari in the *Tennessee Consolidated Coal Co.* case listed a number of District Court decisions which had upheld the constitutionality of the capital stock tax. Since that time, the tax has also been sustained by the Circuit Court of Appeals for the Second Circuit in *Rochester Gas & Electric Corp.* v. *McGowan,* 115 F. (2d) 953 (C. C. A. 2d).

There is only one reason urged for granting the writ in this case which was not also urged in the other cases. The National Industrial Recovery Act levies a tax for the entire year upon corporations which are doing business during any part of the period from June 16, 1933, the effective date of the Act, to June 30, 1933; corporations ceasing to do business prior to June 16, 1933, are not taxed.

Petitioner contends that this provision makes the tax retroactive in effect and that it is so unreasonable, arbitrary and discriminatory as to render the statute invalid.[1] The contention is wholly without merit. The capital stock tax is imposed upon the act of doing business for any part of a year; since petitioner exercised the privilege of doing business after the enactment of the statute, there is nothing retroactive in its application. And since the tax is an excise based upon the value of the capital stock, there is no merit in petitioner's position that it should not be applied to a corporation which was not in existence for the entire year. See *United States* v. *Bennett*, 232 U. S. 299, 307; cf. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Billings* v. *United States*, 232 U. S. 261, 282.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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[1] The same contention is made with respect to the Revenue Act of 1934 which levies a tax if the corporation was doing business for any part of the time between May 10, 1934, the effective date of the Act, and June 30, 1934.